



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-C-, INC.

DATE: MAR. 30, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a chiropractor, seeks to employ the Beneficiary as a clinical instructor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This “EB-2” employment-based classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center initially approved the petition. He subsequently revoked the approval on multiple grounds. On appeal, we found that the Director’s decision did not establish good and sufficient cause for revoking the petition’s approval, and withdrew the Director’s decision. However, we found that the evidence of record did not establish the Petitioner’s continuing ability to pay the proffered wage from the priority date onward, concluded that the petition was not currently approvable, and remanded the case for further consideration and the entry of a new decision. The Director issued a request for evidence (RFE) and, after receiving the Petitioner’s response, denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date.

Since the petition was initially approved, however, the Director’s decision to deny the petition after our remand was procedurally improper. Upon our withdrawal of the Director’s revocation decision, the Director, if he did not intend to approve the decision, should have issued another NOIR instead of an RFE, or an NOIR following the Petitioner’s response to the RFE. His decision should then have been a notice of revocation rather than a denial of the petition. Due to these procedural discrepancies, we will remand the case to the Director for further consideration and the entry of a new decision.

I. ELIGIBILITY ISSUES

We note that the record, as it is presently constituted, does not establish eligibility for the benefit sought. Specifically, the record does not demonstrate the Petitioner’s ability to pay the proffered wage or the Beneficiary’s possession of the required experience.

A. Petitioner's Ability to Pay the Proffered Wage

For immigrant petitions based on an offer of employment, a petitioner must demonstrate its ability to pay the Beneficiary the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). In this case, the proffered wage is \$32,656 per year and the priority date of the petition is September 13, 2011. If a petitioner has filed multiple Form I-140, Immigrant Petition for Alien Worker, petitions, the petitioner must establish its ability to pay the primary beneficiary as well as the beneficiaries of the other Form I-140 petitions.¹ U.S. Citizenship and Immigration Services (USCIS) records show that the Petitioner has filed at least seven other Form I-140 petitions. The current record does not establish the Petitioner's continuing ability to pay the beneficiaries of these petitions as well as the Beneficiary of this petition since the priority date of September 13, 2011.

The record regarding the Petitioner's Form I-140 petitions is incomplete and, therefore, does not establish its ability to pay its total wage obligations. The following information is needed to complete the record:

- A list of all receipt numbers for the Form I-140 petitions that were pending, approved, or filed since the priority date of the current petition (that is, since September 13, 2011);
- The name of each beneficiary;
- The annual proffered wage for each beneficiary;
- The priority date of each petition;
- The status of each petition and the date of any status change (i.e., pending, approved, denied, withdrawn, revoked, on appeal or motion, beneficiary obtained lawful permanent residence);
- Wages paid to each beneficiary for each year starting from the priority date of the current Form I-140 petition or the priority date of the I-140 petition filed on behalf the other beneficiary, whichever is later; and
- Documentary evidence of any wages paid for the relevant years, such as: the beneficiary's IRS Form W-2, Wage and Tax Statements; the beneficiary's IRS Form 1099-MISC, Miscellaneous Income; and the beneficiary's pay vouchers or payroll records, which specify the length of the pay periods and show the beneficiary's gross or net pay, year-to-date income, income tax deductions, and tax withheld.

B. Minimum Requirements of the Labor Certification

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification (in section H) requires a bachelor's degree in health education or physical education and five years of experience as a clinical instructor or a health educator. The labor certification asserts (in section K) that the Beneficiary met

¹ *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

the five-year experience requirement by virtue of her employment as a clinical instructor by [REDACTED] in [REDACTED] South Korea, from April 2, 2003, to May 14, 2008. The description of the Beneficiary's prior employment provided on the labor certification matches the job description of the offered position almost verbatim, only written in the past tense. The identical description of the two positions raises some concern as to the veracity of the experience claimed. Additionally, U.S. government records show that in October 2007, the Beneficiary applied for a nonimmigrant visa. At that time, the Beneficiary reported his present employment as [REDACTED]. This employment is inconsistent with the employment claimed on the labor certification. The Petitioner must resolve the discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although the Petitioner submitted a letter from [REDACTED] the president of [REDACTED] confirming the Beneficiary's experience, this is not sufficient to establish the claimed experience, in light of the discrepancies discussed above. The Director should request additional documentary evidence from the Petitioner, which may include one or more of the following documents covering each of the years from 2003 to 2008:

- Certificates of income from the National Tax Service of Korea (NTSK), the government agency to which all employment in South Korea is required to be reported, confirming the Beneficiary's income from [REDACTED] for each of the years 2003-2008;
- Statements of national pension coverage from the National Pension Service (NPS) confirming the Beneficiary's pension coverage for each of the years 2003-2008;
- End-of-year earnings statements the Beneficiary received from [REDACTED] for each of the years 2003-2008;
- Payroll or tax records from [REDACTED] confirming the Beneficiary's continuous employment from April 2003 to May 2008.

II. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision and remand this case for further consideration. The Director shall determine whether the Petitioner has established its continuing ability to pay the proffered wage of the Beneficiary, as well as the proffered wages of the beneficiaries of its other Form I-140 petitions, from the priority date of September 13, 2011, and whether the Beneficiary meets the minimum experience requirement of the labor certification. In accord with the foregoing discussion, the Director may request additional evidence from the Petitioner with regard to these issues.

ORDER: The Director's decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.